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(Winnipeg Centre)
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COURT OF KING'S BENCH OF MANITOBA

IN THE MATTER OF: The Estate of Helen Small, deceased

APPLICATION UNDER: ***The Court of King's Bench Surrogate Practice Act***, C.C.S.M. c. C290

B E T W E E N:

TRACY BLACK-DONALDSON, TODD BLACK and JAN BLACK, applicants,	)	Kenneth G. Mandzuik for the applicants
- and -	)	John S. Michaels for the respondent
RALPH CONIA, AS EXECUTOR OF THE ESTATE OF HELEN SMALL, respondent.	)	Judgment Delivered: April 8, 2024

REMPEL J.

INTRODUCTION

[1] This case should serve as a cautionary tale to lawyers who treat the will drafting process like a fill-in-the-blank exercise. Offering legal advice to a client who wants a will prepared requires lawyers to do more than satisfy themselves that the client has the requisite mental capacity to give instructions and that the

client can do so freely without undue influence. Lawyers are also under an obligation to explain to the client in clear terms how their assets will be distributed after death when the terms of the will are implemented and how the distribution scheme proposed by the client might impact their beneficiaries. Without taking this vital step, lawyers run the risk of having a client sign a will in the absence of knowledge and approval.

OVERVIEW

[2] At the time of her death in 2019, Helen Small ("Helen") was widowed and she never remarried or lived with a common-law partner. Helen was predeceased by her husband Henry in 2006, and she never had children. The nearest next-of-kin Helen had in 2019 were several nieces and nephews and the children of those nieces and nephews.

[3] Shortly before Henry's death, Helen signed a will prepared by her then-lawyer Ian Restall (the "Restall Will"). The Restall Will named Henry as executor with her nephew Todd Black ("Todd") and Ian Restall as alternate executors. Further, the Restall Will left all of Helen's assets to Henry provided he survived her, failing which the residue was to be divided as follows:

- 35 per cent to her nephew Todd;
- 25 per cent to her niece Tracy Black-Donaldson ("Tracy");
- 25 per cent to her sister, Margaret Rudnick (since deceased); and
- 15 per cent to her nephew Jan Black ("Jan").

[4] About eight years later Helen retained a lawyer from a different law firm to prepare a will, power of attorney and health care directive. The lawyer in question was Sarah Rentz, who was an associate at the Robert Arthur Law Office in Winnipeg at the time. The will drafted by Ms. Rentz was executed by Helen on November 18, 2014 (the "Rentz Will").

[5] The Rentz Will revoked the Restall Will and named Helen's friend Ralph Conia ("Ralph") as executor and Todd as the alternate. The distribution scheme under the Rentz Will was significantly different than the Restall Will and contained the following key provisions:

a) A bequest of all of Helen's common shares and mutual funds were made to Ralph;

b) From the net sale proceeds of her condominium on Wilkes Avenue or whatever residence she might own at her death, the executor was to make the following further bequests:

- $100,000 to Bradley Black ("Bradley"), who is Todd's son, and incorrectly described in the will as a nephew, rather than a grandnephew;
- $100,000 to the Re-Fit Foundation, which is a charitable health foundation in Winnipeg;
- 30 per cent of these sale proceeds to the Winnipeg Jets True North Foundation ("True North Foundation"), which is a charity supporting disadvantaged youth in Manitoba; and

- Any surplus net proceeds were to fall to the residue of her estate;

c) The residue of her estate was then to be divided into four unequal shares as follows:

- 25 per cent to Todd;
- 25 per cent to Tracy (incorrectly named Tracey and described in the will as a nephew rather than a niece)
- 15 per cent to Jan; and
- 35 per cent in trust for the maintenance of Helen's "Burial Plot Fund" for a period of 20 years to cover costs pertaining to "flowers and wreaths, and headstone and/or plaque cleaning." After the 20-year period expired, any balance remaining in the Burial Plot Fund was to be paid to Ralph.

[6] Helen wanted to amend the Rentz Will late in 2016. By that time Ms. Rentz had moved to a different law firm, so Robert Arthur met with Helen on December 5, 2016, to execute a codicil to the Rentz Will (the "Arthur Codicil"). The Arthur Codicil was short and changed two provisions of the Rentz Will. Firstly, the bequest to Bradley was reduced from $100,000 to $75,000. Secondly, the 30 per cent share of the net sale proceeds of her condominium or any other residence she might own at her death designated for the True North Foundation was increased to 35 per cent. The Arthur Codicil confirmed the provisions of the Rentz Will in all other respects.

THE LITIGATION

[7] Two months after Helen died, this court issued probate of the Rentz Will and the Arthur Codicil to Ralph. Tracy, Todd and Jan (the "Applicants") were surprised to learn that Helen had made a will appointing Ralph as executor when they reviewed the probate application at the court registry office.

[8] The Applicants were even more surprised to learn that Helen had assets in her estate of more than $2,000,000 and the lion's share of the estate was passing to Ralph as her investments in common shares and mutual funds were considerably larger than the other assets in her estate.

[9] The inventory filed on Ralph's behalf by Mr. Restall with the probate application showed the following moveable property was subject to probate:

Description of Moveable Property	Value of Property
Royal Bank of Canada	
Chequing	$14,179.85
Mutual Fund#1	701,198.04
US Money Maker	95,018.77
TFSA	69,849.12
RIF	276,321.40
GIC#1	268,765.85
GIC#2	14,716.47
GIC#3	50,850.00
GIC#4	14,806.15
GIC#5	85,273.00
Mutual Fund #2	565,214.00
Total	$2,156,192.65.

[10] The provisions pertaining to the distribution of the net sale proceeds of the condominium on Wilkes Avenue also struck the Applicants as odd because Helen had not occupied the condominium for quite some time. As it turned out Helen had sold the condominium through Mr. Restall's office after the Rentz Will was signed but before the Arthur Codicil was executed. The Arthur Codicil made no reference to the reality that Helen no longer owned real estate at the time of her death.

[11] After the Probate Order issued, the Applicants retained counsel who filed a Notice of Application seeking a declaration that the Rentz Will and the Arthur Codicil were invalid due to the absence of Helen's knowledge and approval of their contents. The Notice of Application filed by the Applicants also sought an order that the Probate Order granted by this court should be revoked, which in effect would render the Restall Will as Helen's last will and testament.

[12] During the course of the litigation, the Applicants also learned that Helen had designated Ralph as the beneficiary of her life insurance policy, which resulted in the payout of a death benefit payment to him of $220,000 on a tax-free basis.

[13] Ralph then had his lawyer file a Notice of Application seeking an order to rectify the terms of the Rentz Will providing for the distribution of the net sale proceeds of her condominium on Wilkes Avenue in Winnipeg or whichever residence she might own at the time of her death to simply read "*To divide the net sale proceeds of my condo [on Wilkes Avenue] as follows*".

[14] The trial proceeded before me over the course of two days. Counsel presented a significant amount of evidence by way of an agreed statement of facts. Counsel also agreed to a process that saw most of the direct evidence of witnesses presented by way of affidavit and that any cross-examination would proceed before me during trial. This hybrid process shortened the time necessary for trial considerably without impacting trial fairness. I commend counsel for the thoughtful way they decided to present the evidence. It should also be noted that the Re-Fit Foundation and the True North Foundation elected not to participate in the trial.

DECISION

[15] I am granting the relief sought by the Applicants to declare the Rentz Will and the Arthur Codicil invalid and I am dismissing Ralph's application seeking rectification. My reasons follow.

FACTS

[16] Ms. Rentz had been practising law for about six months when she received a call from Ralph about meeting with Helen to discuss her estate plan, which included a will, power of attorney and health care directive. After making the appointment, Ms. Rentz attended at Helen's condominium at the appointed time and was greeted by Ralph who introduced Ms. Rentz to Helen and then retreated to a spare bedroom so that the discussions between lawyer and client could occur in private.

[17] Ms. Rentz recalled that Ralph and Helen seemed to have a "very easy rapport" and that Helen mentioned to her that Ralph was "a family friend who helped her out a great deal" after her husband died.

[18] None of these comments were recorded in the hand-written notes Ms. Rentz made of the meeting on that day. In fact, Ms. Rentz could not remember what day the meeting took place because she did not record the date of the meeting in her notes.

[19] It would be generous to describe the notes of this meeting that were taken by Ms. Rentz as "sparse". The instructions as to the will occupy one single piece of paper in the handwriting of Ms. Rentz and contained nothing more than the names of the beneficiaries and the estate distribution as I have already summarized them in these reasons, plus one sentence that provides that the spouse or failing that the children of any pre-deceased named beneficiary should inherit any gift as stated in the will.

[20] Ms. Rentz did not ask about the value of the condominium Helen owned or if it was encumbered by a mortgage, so she had no idea what the net value of the condominium might be. To state the obvious, Ms. Rentz had no way of knowing if the sale proceeds of the condominium would be sufficient to allow for payment of the two bequests totaling $200,000 or possibly leave a surplus for the True North Foundation.

[21] Ms. Rentz did not make the value of the common shares and mutual funds designated for Ralph a topic of conversation either. No inquiries were made

by Ms. Rentz about their value or who might pay the taxes that the deemed disposition on death of these assets would attract. Helen did not volunteer any of this information either and was never asked to produce any of her financial documents for review.

[22] During her examination Ms. Rentz was asked about what Helen might have known about her assets on the day of the meeting. The exchange went as follows (Rentz Transcript, p. 16, lines 13-15):

> 93 Q. If [Helen] had died that day, would she know how much anyone was going to be getting?
>
> A. I don't know what she knew that day.

[23] In another exchange Ms. Rentz was asked if she took the time to translate the legal English contained in the will into the kind of English that a lay person could understand. The following exchange took place (Rentz Transcript, p. 29, line 25 to p. 30, line 10):

> 168 Q. Yes. That's how I always try to do it.
>
> Now, when you went through the will, could you have gone through how the will actually would have worked? Would you have used any examples of who would get what based on different values?
>
> A. I don't remember. I don't think so. Just to clarify, you mean, like, would I have said, for instance, if you have $100.00, that means so and so gets this and …
>
> 169 Q. Exactly.
>
> A. Yeah. No, I don't think – I don't believe I would have done that.

[24] As it turned out there were many other things that Ms. Rentz did not know at the time of the meeting, that she could have discovered had she asked, including that:

- Ralph was Helen's former financial planner;
- Ralph was not listed as a beneficiary in the Restall Will and only immediate family members were intended to benefit under that will;
- Ralph was named as the beneficiary under her life insurance policy, which would result any tax-free payment to him of $220,000 outside of the estate upon her death;
- The burial plot where Helen had her husband's remains interred and where she intended to be laid to rest, was maintenance free and had no receptacle or vases for flowers;
- Helen, who was content to place the same plastic flower wreath beside her late husband's grave marker year after year, would want to have a sum in excess of $100,000 set aside in a trust fund for flowers and wreaths for a pre-paid burial plot that was essentially maintenance-free for 20 years;
- How Helen would react to the knowledge that there would be ongoing legal expenses, accounting fees and tax payments for this Burial Plot Fund over 20 years;
- How taxes and expenses would have different impacts on Ralph compared to the residual beneficiaries;

- Overall Ralph stood to inherit $1,361,000 on a tax-free basis and the residual beneficiaries would share about $611,351 after assuming the entire burden of probate fees, funeral expenses, professional fees, taxes and other costs; and
- The risk of the gift representing the sale of the condominium might fail (adeem) if Helen or her power of attorney sold the condominium prior to death.

[25] Had any of these questions been pondered by either Ms. Rentz or by Helen, it is unlikely that the handwritten notes taken of that meeting would have occupied only a single sheet of paper. Although I cannot say with any certainty how Helen would have responded to any of the above noted questions, there can be no doubt that Ms. Rentz was absolutely accurate when she testified that she did not know what Helen knew about her estate or how it would be distributed had she died on the day of the meeting.

[26] Like Ms. Rentz, Mr. Arthur also declined to ask Helen any questions about the value of her assets or the legal status of the title to her condominium on the day he went to see Helen at the Riverview Nursing Home ("Riverview"), where Helen was a resident, to execute the Arthur Codicil. Had Mr. Arthur asked about the status of the condominium, Helen may have said that she had already accepted an offer to sell it for $270,000 and that the possession date had occurred about one month prior to the meeting. In fact, Helen may also have said that she had received most of the net sale proceeds of the condominium from Mr. Restall's

office almost two weeks prior to the day Mr. Arthur met with her on December 5, 2016 to sign the Arthur Codicil.

[27] The only thing Mr. Arthur knew about Helen prior to the meeting was in a note from one of his staff on November 24, 2016 who spoke to either Helen or Ralph about a codicil with the two changes as I have already set out in these reasons and a phone call with Helen later that day, that led Mr. Arthur to make a simple note on his file that simply read "(e1) Bradley Black $75,000 and (e3) 35% to True North". Apart from that, the note recorded the name "Ralph" with a phone number and Helen's room number at Riverview above the words "will need (illegible) signing".

[28] Mr. Arthur reviewed the file copy of the Rentz Will in his office and drafted the Arthur Codicil based strictly based on the conversation he had with Helen as recorded in the note. Mr. Arthur made no effort to ask some probing questions of Helen about the changes she was proposing to the Rentz will or who Ralph was or why he was assisting her. A copy of the Arthur Codicil was not presented to Helen in advance of the meeting for her consideration and he took no notes of his meeting with Helen at the time of the execution of the Arthur Codicil.

[29] In summary, Mr. Arthur arrived at Riverview to meet with Helen for his first and only meeting with her with the final draft of the Arthur Codicil in hand, without having any information about the ownership status of her condominium or her other assets and no idea as to how the proposed distribution in the Rentz Will would impact the beneficiaries.

[30] The following exchanges from Mr. Arthur's examination are telling (Arthur Transcript, p. 8, line 16 to p. 10, line7; p. 13, line 19 to p. 15, line 9):

> 39 Q. Sir, do you have any independent recollection of your conversation with Helen at this point?
>
> A. Not specifically, other than – I can only assume that she reiterated, like, what she had – well, if – I'm not sure if she was the one that initially gave the instructions on the 24th, but I would have asked her about those two specific items and whether or not there was anything else that she wanted to change. And when she affirmed that those were the changes she wanted, I would have just said, Fine. We'll do it up for you and come and make arrangements for signatures.
>
> 40. Q. Sir, with respect, I don't want assumptions because they're not going to assist us. I want to know what you've recalled. So you're telling me that you cannot recall specifically speaking to Mrs. Small to get these changes to her codicil, correct?
>
> A. I cannot, no.
>
> 41 Q. And you're telling me that you made no notes at the time that she was giving instructions, correct?
>
> A. Correct.
>
> 42. Q. All right. And when you signed the codicil, did you make any notes about your meeting?
>
> A. No. I would have just gone there with the codicil in hand and I would have discussed with her the contents of the codicil. Made sure that she didn't want any other changes. Made sure that she was comfortable with these specific changes. And then we would have signed the codicil.
>
> 43. Q. And, sir, again these are your assumptions based on your typical practice, not on independent recollection?
>
> A. Yeah, I don't – like, I don't specifically recall that day, in terms of – obviously I've had lots of clients over the years. I – you know, this is a long time ago. I don't specifically recall meeting at that specific day and time, but –
>
> 44 Q. And sir, do you remember if anyone met you at the door? Was Mr. Conia there, for example?
>
> A. You know, I don't recall. It's certainly possible because either I would have enquired from the front desk as to whether I could see

Mrs. Small or if Mr. Conia was there, he would have met me and we would have gone to the room.

45 Q. All right. But again you have no independent recollection and you've got no notes about who was there or not, right?

A. No.

. . .

62 Q. All right. And did you take any steps to ascertain whether she still owned the condo in --

A. No, I did not.

63 Q. You did not? All right. And did you have any discussions with her about why she wanted to reduce Bradley's share from 100 to $75,000.00?

A. You know, Mrs. Small is a very demanding, I guess, lady and so my recollection of her is that she knew what she wanted. And so if I asked if she wanted a clause changed, she – No. She would be fairly aggressive in terms of her directing me to do what she wanted and not to question her choice in terms of what she wanted to do.

64 Q. Sir, did you ask her why she was changing her bequest to Bradley from 100 to 75,000?

A. I don't recall specifically whether I asked that, but, I mean, as part of the review, I imagine we did discuss what the changes were.

65 Q. Right. But you don't recall whether you asked her that, right?

A. Correct.

66 Q. All right. And do you recall if you asked her why she was going from 30 to 35 percent for True North?

A. I don't have a specific recollection of that, but I do know that that was a charity that she had a fond affiliation for.

67 Q. And how do you know that?

A. She would have said so. She just said that she, you know, considered that a charity that she wanted to benefit.

68 Q. And did you have any discussion with her what that 5 percent change would have meant in real dollars?

A. No, I did not.

69 Q. Did you have any knowledge of what her condominium was worth?

A. No, I did not.

70 Q. So you didn't discuss with her whether this was a 5,000 dollar change or a 50,000 dollar change?

A. No.

71 Q. Were you aware that she had moved out of that condo roughly a year before you met with her in Riverview?

A. No.

THE LAW

[31] ***Vout v. Hay***, 1995 CanLII 105 (SCC), [1995] 2 S.C.R. 876, is the leading authority with respect to the burden of proof and standard of proof resting on a party seeking to enforce or validate a will (the "Propounder") and a party challenging its validity (the "Challenger").

[32] ***Vout*** establishes three essential elements of proof in contested will scenarios, namely:

a) Due execution which requires the Propounder of the will to prove compliance with the statutory requirements of the applicable province that speak to how wills are to be signed and witnessed and also *"that the testator knew and approved of the contents of the will"* (at para. 19);

b) The Propounder must *"establish that the testator had a disposing mind and memory"* or in other words testamentary capacity (at para. 20); and

c) The Challenger bears the burden of proving undue influence that demonstrate that the will does not represent what the testator wanted (at para. 21).

[33] It is clear from reading ***Vout*** that knowledge and approval of the contents of a will constitutes an essential element of proof resting on a Propounder and it means more than the mere ability of a testator to understand or comprehend the meaning of the words on the printed page of a will.

[34] Suspicious circumstances often form part of a challenge to a will and they must be proven on the balance of probabilities, but "*[t]he extent of the proof required is proportionate to the gravity of the suspicion and the degree of suspicion varies with the circumstances of each case*" (***Vout***, at para. 24).

[35] ***Vout*** teaches at para. 25 that suspicious circumstances may be raised by:

> 25 … (1) circumstances surrounding the preparation of the will, (2) circumstances tending to call into question the capacity of the testator, or (3) circumstances tending to show that the free will of the testator was overborne by acts of coercion or fraud. Since the suspicious circumstances may relate to various issues, in order to properly assess what effect the obligation to dispel the suspicion has on the burden of proof, it is appropriate to ask the question "suspicion of what?" See Wright, *supra*, and *Macdonell, Sheard and Hull on Probate Practice* (3rd ed. 1981), at p. 33.

[36] ***Scott v. Cousins***, 2001 CarswellOnt 50, [2001] O.J. No. 19, offers the following neat summary of the key principles set out in ***Vout***, at para. 39:

> 39. …
>
> 1. The person propounding the will has the legal burden of proof with respect to due execution, knowledge and approval and testamentary capacity.

> 2. A person opposing probate has the legal burden of proving undue influence.
>
> 3. The standard of proof on each of the above issues is the civil standard of proof on a balance of probabilities.
>
> 4. In attempting to discharge the burden of proof of knowledge and approval and testamentary capacity, the propounder of the will is aided by a rebuttable presumption.
>
> Upon proof that the will was duly executed with the requisite formalities, after having been read over to or by a testator who appeared to understand it, it will generally be presumed that the testator knew and approved of the contents and had the necessary testamentary capacity. (at page 227)
>
> 5. This presumption "simply casts an evidential burden on those attacking the will." (*ibid.*)
>
> 6. The evidential burden can be satisfied by introducing evidence of suspicious circumstances - namely, "evidence which, if accepted, would tend to negative knowledge and approval or testamentary capacity. In this event, the legal burden reverts to the propounder." (*ibid.*)
>
> 7. The existence of suspicious circumstances does not impose a higher standard of proof on the propounder of the will than the civil standard of proof on a balance of probabilities. However, the extent of the proof required is proportionate to the gravity of the suspicion.
>
> 8. A well-grounded suspicion of undue influence will not, *per se*, discharge the burden of proving undue influence on those challenging the will:
>
> > It has been authoritatively established that suspicious circumstances, even though they may raise a suspicion concerning the presence of fraud or undue influence, do no more than rebut the presumption to which I have referred. This requires the propounder of the will to prove knowledge and approval and testamentary capacity. The burden of proof with respect and fraud and undue influence remains with those attacking the will. (*ibid.*)

[37] John E.S. Poyser's text, *Capacity and Undue Influence*, 2nd ed. (Toronto: Thomson Reuters Canada, 2019), describes the presumption of knowledge and approval as a commonsense inference that that a will represents

a testator's testamentary wishes, as most people make a point of understanding the essence of important documents before they sign them, at pp. 234-235:

> 3 Presumption of Knowledge and Approval
>
> (a) The Presumption of Knowledge and Approval in General
>
> … Thus, simple proof that the will was signed by the will-maker, or read over by the will-maker, or read over by the will-maker, is held to be sufficient to trigger the presumption. It allows the court to make a systematic inference of fact — the will-maker *probably* knew and intended the content of the will. The will-challenger is forced, if he or she seeks to avoid that inference, to put some evidence before the court to displace the presumption. That is done by pointing to evidence that sours the inference of the common sense that would normally carry it. Put another way, the evidence displaces the presumption by raising a suspicion in the mind of the judge that the will-maker may not have known and approved the content of the will.

[38] Mr. Poyser then continues by commenting on the nature of the evidence that may suffice in negating the presumption of knowledge and approval in the following paragraph, at p. 235:

> While the presumption of knowledge and approval is easily triggered, it is also easily brushed away. The challenger need only adduce some evidence tending to call knowledge and approval into issue. That might be that the will-maker was blind, or English was a second language, or that the will-maker may have lacked capacity. Further, it might be evidence that the will was procured and put before the will-maker for signature by someone taking an advantage under it. The ease with which the presumption is brushed away justifies the ease with which it can be invoked. The challenger, in essence, responds to the propounder by saying that while the mere fact of execution might, in the normal course, support the conclusion of probable knowledge and approval, it does not make sense to draw that conclusion in the case at hand – the situation is different in some way.

ANALYSIS

[39] There was some disagreement between counsel in this case as to what a suspicious circumstance might entail. Counsel for Ralph points to the fact that there is no evidence that Ralph had any knowledge as to what Helen's estate plan was and he made no effort to meddle in her estate planning or influence the ultimate outcome of what provisions the will might contain. As a result, counsel for Ralph argued that the test for raising suspicious circumstances has not been met and that the presumption of knowledge and approval should apply.

[40] Although all of the evidence before me suggests that Ralph was acting honourably throughout the time that the Rentz Will and the Arthur Codicil were being drafted and he had Helen's best interests at heart, I am satisfied that this finding does not preclude a finding of suspicious circumstances as that term has come to be defined in the case law.

[41] Although the existing case law often examines allegations of suspicious circumstances in the context of a rogue actor who is using nefarious tactics to obtain a benefit of some kind under the will contrary to the true wishes of the testator, that is not the only kind of circumstance that can meet the suspicious circumstances test. There are a wide variety of circumstances that might be sufficient to raise the concern of the court in the context of an analysis as to knowledge and approval.

[42] In that sense I think counsel for the Applicants is correct in pointing out that in some fact scenarios the court might find that a suspicious circumstance

could be nothing more than a circumstance that the Challenger can point to, which if accepted as proven "*would tend to negative knowledge and approval*". (See ***Vout***, at para. 27 and the Poyser text I have already quoted from in these reasons.) I would colloquially describe this process as a "smell test" and if the facts relied on by the Challenger meet this test, the presumption as to knowledge and approval will be spent and the Propounder will reassume the legal burden of proof on this essential element in a contested will scenario.

[43] I am satisfied that the Applicants have met the suspicious circumstances test on all of the evidence. The most significant factors that meet the suspicious circumstances standard in my opinion are that:

a) Ralph, was not a member of Helen's family and stood to benefit as a beneficiary under the will and was involved in the process of arranging the meetings with the lawyers;

b) Ralph was named as a beneficiary of Helen's life insurance policy and was set to receive the lion's share of Helen's estate under the Rentz Will;

c) The Rentz Will represented a significant departure from the distribution scheme under the Restall Will as it overwhelmingly benefitted Ralph at the expense of immediate family members who stood to inherit Helen's entire estate under the Restall Will; and

d) The Burial Plot Fund would at a minimum amount to $100,000 or arguably significantly more than that, to cover expenses for a burial plot

> that was virtually maintenance free and meant to honour a woman who was not only content with a modest lifestyle, but frugal to the point that she reused a plastic flower wreath to mark her husband's grave site every year.

[44] In my view the gravity of the suspicious circumstances raised by the Applicants are at the high end of the range. Although this finding does not raise the standard of proof as to knowledge and approval that Ralph must now discharge to a level higher than the balance of probabilities, it does at a minimum mean that Ralph's opinions alone as to Helen's knowledge and approval cannot carry the day here as he stands to benefit from the Rentz Will in a significant way.

[45] Ralph must tender other evidence in support of his contention that Helen had knowledge and approval as to how her estate would be distributed under the terms of the Rentz Will and the Arthur Codicil. The record is clear that the lawyers can offer no evidence to assist Ralph in proving knowledge and approval because they failed to ask the kinds of questions that might have shed some light on what Helen knew about the value of her assets and how the net proceeds would be distributed amongst her various beneficiaries after payment of all taxes and expenses.

[46] I would hasten to add that the lawyers not only failed to ask the kinds of questions that could have shed light on the issue of knowledge and approval, but they also made no inquiries that would establish whether Helen had the necessary degree of testamentary capacity required under the well-known

Banks v. Goodfellow test (***Banks v. Goodfellow***, (1870), L.R. 5 Q.B. 549, [1861-1873] All E.R. Rep. 47 Q.B., which is set out as follows, at p. 565:

> It is essential to the exercise of such a power [of testamentary capacity] that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties — that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.

[47] ***Schwartz v. Schwartz***, 1970 CanLII 32 (ON CA), [1970] 2 O.R. 61, aff'd 1971 CanLII 17 (SCC), [1972] S.C.R. 150, restates the ***Banks v. Goodfellow*** test as follows, at pp. 78-79:

> The testator must be sufficiently clear in his understanding and memory to know, on his own, and in a general way (1) the nature and extent of his property, (2) the persons who are the natural objects of his bounty and (3) the testamentary provisions he is making; and he must, moreover, be capable of (4) appreciating these factors in relation to each other, and (5) forming an orderly desire as to the disposition of his property: see Atkinson on Wills (1953), 2nd ed., p. 232; 39 Hals., 3rd ed., pp. 855-6.

[48] Although the issues of undue influence and mental capacity were not raised by council for the applicants during final arguments, it is difficult to imagine how Ralph could have discharged his burden of proof under the ***Banks v. Goodfellow*** standard on the facts before me.

[49] By reassuming the burden of proof as to knowledge and approval, Ralph is in the same shoes as the propounder of a will in ***Slobodianik v. Podlasiewicz***, 2003 MBCA 74 (CanLII). In ***Slobodianik***, the matter at issue was testamentary capacity, rather than knowledge and approval, but the duty of a lawyer taking

instructions from a client once suspicious circumstances have been raised apply with equal force to the facts of this case.

[50] Chief Justice Scott C.J.M. (as he then was) writing for the Court of Appeal in ***Slobodianik*** concluded at paras. 28-29:

> 28 As to the role of a solicitor taking instructions from an elderly testator, he quoted with approval the following passage from *Murphy v. Lamphier* (1914), 31 O.L.R. 287 (Ont.H.C.) at 318 (at para. 81):
>
> A solicitor is usually called in to prepare a will because he is a skilled professional man. He has duties to perform which vary with the situation and condition of the testator. In the case of a person greatly enfeebled by old age or with faculties impaired by disease, and particularly in the case of one labouring under both disabilities, the solicitor does not discharge his duty by simply taking down and giving legal expression to the words of the client, without being satisfied by all available means that testable capacity exists and is being freely and intelligently exercised in the disposition of the property. The solicitor is brought in for the very purpose of ascertaining the mind and will of the testator touching his worldly substance and his comprehension of its extent and character and of those who may be considered proper and natural objects of his bounty. The Court reprobates the conduct of a solicitor who needlessly draws a will without getting personal instructions from the testator, and, for one reason, that the business of the solicitor is to see that the will represents the intelligent act of a free and competent person.
>
> 29 Guided by these principles, Hunter J. concluded that the solicitor (at para. 93):
>
> … did not go far enough, given the suspicious circumstances … to substantiate testamentary capacity. Further inquiries needed to be made to ascertain Ms. Peter's capacity. Perhaps those inquiries were made, but if so, they were not documented and [the solicitor] has a very limited recollection of their conversations. If a solicitor has good reason to be concerned about testamentary capacity – and such seemed clearly to be the case here – then a systematic assessment of the testator's capacity should take place, and if doubts remain then there should be an assessment by a physician or a psychologist.

[51] In ***Slobodianik***, the Manitoba Court of Appeal quoted from ***Scott v. Cousins*** in support of the conclusion that a lawyer has a responsibility

to assess testamentary capacity at the time instructions for a will are taken which requires the lawyer to make "*a serious attempt to determine whether the testator or testatrix has capacity and, if there is any possible doubt - or other reason to suspect that the will may be challenged - a memorandum, or note, of the solicitor's observations and conclusions should be retained in the file*" (citations omitted) (at para. 30). Again, in my view these findings apply with equal force to assessments of knowledge and approval.

[52] The concluding paragraphs in ***Slobodianik*** are apposite in my view and bear repeating in full, as they clearly set out the obligations of a lawyer to be alive to the possibility that suspicious circumstances might be at play as they take instructions for a will and how they can protect the integrity of the will should it ever be challenged due to lack of testamentary capacity or the absence of knowledge and approval, at paras. 32-33:

> 32 In my opinion, Mr. Iwanchuk's evidence simply does not meet the obligation expected of a lawyer in circumstances such as those before us. There were no notes; conclusions were expressed but the factual background required to justify these conclusions was either absent or substantially lacking in detail. The testator was not examined in any meaningful way as to his ability to understand. There was no systematic assessment of the testator's capacity, and no detail was provided to enable the court to determine whether adequate steps had been taken to satisfy the question of testamentary capacity.
>
> 33 This is simply not good enough. Reviewing Mr. Iwanchuk's evidence in its entirety, it is not clear to me why he was of the view that he could safely take instructions. His conclusion is plain enough, but the facts to support it are not. There is no issue of credibility to be concerned about; the question simply is whether or not there were facts established to demonstrate that the well-known legal requirements set forth in *Banks v. Goodfellow* have been met. There is no convincing evidence of testamentary capacity on the record. In the result, I conclude that the trial judge committed palpable and overriding error and I would allow the appeal with costs.

[53] The fact that lawyers do not have the luxury of acting as mere stenographers when they take instructions for a will or codicil is also spelled out in ***Danchuk v. Calderwood***, 1996 CanLII 914 (BC SC), 15 E.T.R. (2d) 193 (B.C.S.C.), at para. 118:

> [118] In this perspective, I understand the law to be that a solicitor does not discharge her duty in the particular circumstances here by simply taking down and giving expression to the words of the client with the inquiry being limited to asking the testator if he understands the words. Further, I understand it to be an error to suppose because a person says he understands a question put to him and gives a rational answer he is of sound mind and capable of making a will. Again, in this perspective, there must be consideration of all of the circumstances and, particularly, his state of memory.

[54] Ralph is in a legal predicament when it comes to proving knowledge and approval, because he can do nothing more than delve into speculation of the "if wishes were horses" variety given the total absence of evidence from Ms. Rentz or Mr. Arthur as to what Helen may have known about the value of her assets and the nature of the assets in her investment portfolio.

[55] The fact that Helen opened the envelopes that contained her various and sundry investment statements and filed them in chronological order in a shoe box under her bed does not amount to proof that she understood what their value was. The fact that Helen meticulously balanced her cheque book every month is not persuasive either. These facts fail to prove that Helen must have known what kind of taxes would arise from the deemed disposition of shares and mutual funds on death or that Ralph would not wind up paying these taxes because the tax burden would fall to the residual beneficiaries. It also fails to prove that Helen

understood the rule of ademption that applied to her condominium. In general terms a bequest of a specific asset in a will adeems or fails if that asset is disposed of prior to death.

[56] The contention that Helen was a savvy business person because she held a diversified portfolio of investments that garnered good returns does not move the needle towards satisfying the burden of proof as to knowledge and approval in my view. No evidence was led as to when her investment portfolio was designed or if she designed it herself. Ralph was her investment advisor for a short period of time when Helen's husband was still alive but he offered no evidence on these points and he did not call anyone from Royal Bank to substantiate his contention that Helen was a sophisticated investor that was up-to-date on the tax rules applicable to her estate after death.

[57] Nothing in the investment statements support a finding that Helen was a sophisticated or savvy investor. Helen was not actively trading stocks or bonds and she was typically content to reinvest her returns. The description of Helen placing her investments on "cruise control" as argued by counsel for the Applicants is fitting in my view.

[58] ***Halliday v. Halliday Estate***, 2019 BCSC 554 (CanLII), offers an easily understandable explanation as to the legal distinction between testamentary capacity and knowledge and approval, at para. 178:

> 2. Capacity
>
> [178] In his book *Capacity and Undue Influence* (Toronto: Carswell, 2014), John E.S. Poyser discusses the distinction at page 235:
>
> Lord Justice Moore-Bick went on to comment on the distinction between testamentary capacity, on the one hand, and knowledge and approval on the other, giving an elegant formulation to distinguish between them (emphasis added):
>
> The use of the expression "knowledge and approval" is liable to give the impression that the court is concerned with whether at the time he executed the will the testator must be able to reconsider all the dispositions he has made. That would require testamentary capacity, but that is not what is meant by the convenient expression "knowledge and approval". Modern authorities recognise that a clear distinction is to be drawn between testamentary capacity and knowledge and approval. As the judge observed in this case … testamentary capacity includes the ability to make choices, whereas knowledge and approval requires no more than the ability to understand and approve the choices that have already been made.
>
> Paraphrasing a different comment elsewhere in the reasons for decision, the twin requirements of knowledge and approval in testamentary capacity ensure that the will is the product of the conscious intention of a sound mind. Knowledge and approval is the "conscious intention" in that formula.
>
> [Emphasis in original]

[59] The practical impact of this distinction is that Ralph cannot meet his burden as to proof of knowledge and approval by showing that Helen was fully capable of making choices about how her assets were to be distributed after death – rather Ralph must prove that Helen knew or approved of the choices she purportedly made. (See ***Geluch v. Geluch Estate***, 2019 BCSC 2203, at para. 125.)

[60] Proof that a testator was intelligent, mentally alert and aware of the value of their investments alone, without other evidence, is not necessarily sufficient to satisfy the burden of proof as to knowledge and approval. ***Geluch*** makes this point by quoting from ***Russell v. Fraser***, 1980 CanLII 737 (BC CA), 118 D.L.R. (3d) 733, at paras. 160-161:

[160] Anderson J.A.'s analysis in *Russell* is apposite here:

> [12] Counsel for the appellant also submits that the learned trial Judge erred in finding that the testatrix did not "know and approve" the residuary clause. In my view, the learned trial Judge did not mean to say that the testatrix did not "know and approve" of the residuary clause as written. She may and probably did approve of the residuary clause in the abstract. The reasons for judgment when read as a whole indicate to me that the learned trial Judge found that the appellant had not met the onus of proving that the testatrix "appreciated the effect of what she was doing" in leaving the appellant the gift of residue.
>
> [13] I have carefully analyzed the evidence of Mr. Hoffman and while he discussed the residuary clause with the testatrix, there is no evidence that he discussed the size of the residual gift with the testatrix. The onus was on the appellant to prove affirmatively that the testatrix was aware of the approximate extent of the residuary gift at the date the will was drawn and of the factors that would cause it to change in extent. As Mr. Hoffman is the only person who had any discussions with the testatrix, it becomes obvious that there was no evidence to support the conclusion that she was aware of the value of the gift of residue. Such evidence cannot be supplied in this case by showing that the testatrix was an intelligent, mentally alert person and was aware of the amount standing to her credit in her various bank accounts. What is required here is positive proof. That is the reason for imposing on a solicitor the duty referred to in *Murphy v. Lamphier* (1914), 31 O.L.R. 287 at p. 319, where Boyd C. said:
>
> > … where instructions are given by an interested party, it is the bounden duty of the solicitor to satisfy himself thoroughly as to the testator's volition and capacity, or, in other words, that the instrument expresses the real testamentary intentions of a capable testator, prior to its being executed *de facto* as will…
>
> [Affirmed 1914 CanLII 535 (ON CA), 20 D.L.R. 906, 32 O.L.R. 19], See also *Re Worrell* (1969), 1969 CanLII 269 (ON SC), 8 D.L.R. (3d) 36, [1970] 1 O.R. 184. The solicitor must make the necessary inquiries so that if called upon he can show that by reason of the inquiries made by him and his discussions with the testatrix, the testatrix fully appreciated the effect of what she was doing when she made her will. There is no evidence to show that this was done.

[161] In this case, Carol gave instructions to [the lawyer] to leave the residue of Jean's estate to her. This placed a higher duty on [the lawyer] to satisfy himself that the instrument represented Jean's true testamentary intention. [The lawyer] did not make the necessary inquiries that would

> enable him to determine that Jean fully appreciated the effect of what she was doing when she made Carol her residual beneficiary or even what the value of the residue was. As such, I find that Jean did not know or approve of the residue clause in the January 12 Will and the residue clause is invalid.
>
> [Emphasis added]

[61] Ralph has not offered positive proof with regard to knowledge and approval, which in this case would be that Helen probably knew or approved of the choices that she made about the distribution of her assets that she expressed verbally to Ms. Rentz and Mr. Arthur and which were dutifully transcribed, word for word, in the Rentz Will and the Arthur Codicil. The disproportionately large benefit to Ralph of over half of the estate under the Rentz Will in contrast to the provisions of the Restall Will, which left everything to immediate family members, clearly speaks to an absence of positive proof. The absurdity of a Burial Plot Fund worth well over $100,000 for a maintenance-free grave site also speaks clearly to a lack of positive proof as to knowledge and approval. I am also of the view that Helen did not have knowledge as to the rule of ademption, which meant that her decision to sell the condominium prior to her death resulted in that gift failing and leaving nothing to the three beneficiaries of the potential sale proceeds.

[62] For all of these reasons I am satisfied that the Rentz Will and the Arthur Codicil are invalid due to a lack of knowledge and approval. The probate order issued by this court dated February 7, 2020 is rescinded accordingly.

RECTIFICATION AND ADEMPTION

[63] Ralph's application to rectify the will must fail. The application is a transparent attempt to avoid the consequences of the principle of ademption as

it applies to the condominium sold by Helen prior to her execution of the Arthur Codicil. Under the principle of ademption the gift fails because by virtue of the sale of the condominium prior to her death, Helen is deemed to have manifested an intention that the stated beneficiaries in her will were no longer entitled to receive the title to the condominium or the proceeds of sale that she secured before she died.

[64] The decision of this court in ***Dearden's Will, Re***, 1987 CanLII 7141 (MB QB), 46 Man. R. (2d) 222, offers an extensive review of the authorities applicable to the principle of ademption beginning at para 33. Ultimately a finding was made, at para. 38, that:

> [38] From the foregoing, I infer that if ademption is to occur, the contract of sale must be enforceable both by and against the testator. A sale by a testator which is not enforceable does not cause ademption. See *Re Pearce; Roberts v. Stephen* (1894), 8 R. 805 and *Re Thomas; Thomas v. Howell* (1886), 34 Ch. D. 166. Those cases are authority for the proposition that a contract for sale rescinded by the purchaser does not result in ademption.

[65] In this case the title to the condominium sold by Helen in her lifetime had passed to the purchaser and she had received most of the sale proceeds before the Arthur Codicil was executed. There were no remaining unsatisfied conditions of the contract for sale of condominium that either Helen or the purchaser could enforce or rescind at the time of Helen's death. All of the terms of the contract had been satisfied before Helen died and the transaction was irreversible.

[66] ***Dearden's Will, Re*** adopted the conclusion in ***Re Rodger***, 1966 CanLII 507 (ON SC), 60 DLR (2d) 66, as to the application of the principle of ademption, at para. 44:

> [44] The following remarks of Parker, J., are to be found at p. 668:
>
> > If the agreement between the deceased and Silverberg is an actual agreement for sale and enforceable there is no doubt but that there would be an ademption of the devise. If, after a specific devise of property, the testatrix by a valid and enforceable contract for sale and purchase agrees to sell the lands to another the testatrix has in effect done two things, firstly, she has manifested an intention that the devisee should not receive the lands as such and secondly, has converted his or her interest in the realty to a claim for the price. In my opinion, however, the document in question is actually not an agreement for sale and purchase, although it is so called, but is really only an option to buy. There is nowhere evidence as to the acceptance of the title (although perhaps I should presume this) the purchaser can escape closing the transaction by simply failing to acquire one piece of property or delay causing to be made final any necessary rezoning,

[67] It is not proper for Ralph to make an end run around the principle of ademption by invoking the principle of rectification. It would render the principle of ademption into a meaningless concept and open the floodgates to litigants who want to reverse the impact of this doctrine.

[68] Even if I am wrong on that point, the law of rectification does not apply in these circumstances as nothing was lost in translation from the time Helen gave her instructions to the lawyers to the time the lawyers reduced her words to the printed page. The first principles as to the law of rectification are neatly summarized by Kroft J. (as he then was) in ***Weiss Estate v. Weiss; Weiss v. Weiss Estate***, 2022 MBQB 13 (CanLII), beginning at para. 41. My review of these principles satisfy me that the rectification application must fail on these facts.

[69] The legal problem that Ralph cannot overcome, as I have already reviewed in detail, is that despite the fact that Helen's lawyers reduced her instructions to writing with precision, I am still not satisfied on the balance of probabilities that she had knowledge of and gave approval to the contents of the Rentz Will and the Arthur Codicil.

CONCLUSION

[70] For all of these reasons the application to invalidate the Rentz Will and the Arthur Codicil is granted, and the probate order issued by this court on February 7, 2020 is rescinded. The application for rectification filed by Ralph is also dismissed.

[71] The parties can speak to costs if they cannot agree, provided they file written briefs in advance.

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Rempel J.